SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

MORTON K. OHLSON, et al.,
Appellants,

vs.

KENNETH PHILLIPS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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INDEX

Jurisdictional Statement 1
Memorandum Opinion and Order Below 2
Jurisdiction 2
State Law Involved 2
Questions Presented 3
Statement of the Case 4
The Questions are Substantial 6
Conclusion 19
Appendix A—Memorandum Opinion and Order filed October 16, 1969 ..... A1
Appendix B—Teachers Oath Statute A11

Table of Authorities

CASES

Anderson v. *Board of Education*, 61 N.E.2d 562 (Ill., 1945) 18
Baggett v. *Bullitt*, 377 U.S. 360 (1964) 2, 8, 9, 11, 13, 15
Barenblatt v. *United States*, 360 U.S. 109 13
Brandenberg v. *Ohio*, ... U.S. ....., 89 S.Ct. 1827 (1969) 10, 14
Bruck v. *State ex rel. Money*, 91 N.E.2d 349 (Ind., 1950) 18
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 15
City of El Paso v. *Simmons*, 379 U.S. 497 (1965) 17, 18
Connally v. *General Construction Company*, 269 U.S. 385 ..... 9, 10
Cramp v. *Board of Public Instruction of Orange County*, 369 U.S. 278 (1961) 10
Dennis v. *United States*, 341 U.S. 494 13

Douglas v. *California*, 372 U.S. 353 16
Dugan v. *School District No. 1, Arapahoe County*, 128 Colo. 394, 205 P.2d 998 (1954) 17
Elfbrandt v. *Russell*, 384 U.S. 11 (1968) 11, 13, 15
Ex parte Garland, 4 Wall. 333, 18 L.Ed. 306 (1867) 11
Fletcher v. *Peck*, 6 Cranch. 87, 2 L.Ed. 328 (1810) 17
Florida Limé and Avocado Growers, Inc. v. *Jacobsen*, 362 U.S. 73 (1960) 2
Gallagher v. *Smiley*, 270 F. Supp. 86 12
Home Building and Loan Association v. *Blaisdell*, 290 U.S. 398 (1934) 18
Hosack v. *Smiley*, 276 F. Supp. 876 (D. Colo. 1967) aff'd. 390 U.S. 744 7
Keyishian v. *Board of Regents*, 385 U.S. 589 (1966) 8, 11, 12
Kramer v. *Union Free School District No. 15*, ... U.S. ..... , 89 S.Ct. 1886 (1969) 16
Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 10
Louisiana ex rel. Gremillion v. *Lightfoot*, 366 U.S. 293 (1961) 14
Maxey v. *Jefferson County School District R-1*, 158 Colo. 583, 408 P.2d 970 (1965) 17
McLaughlin v. *Florida*, 379 U.S. 188 (1964) 16
Nostrand v. *Little*, 362 U.S. 474 (1960) 11
Noto v. *United States*, 367 U.S. 290 ..... 10, 14
Palmetto Fire Ins. Co. v. *Conn*, 272 U.S. 295 (1926) 2
Pedlosky v. *Massachusetts Institute of Technology*, 224 N.E.2d 414 10
Shelton v. *Tucker*, 364 U.S. 479 (1960) 2, 15, 16
Speiser v. *Randall*, 357 U.S. 513 11
State ex rel. Tittle v. *Covington Community Consolidated School District*, 96 N.E.2d 334 (Ind., 1951) 18
Stevenson v. *Binford*, 287 U.S. 251 (1952) 17

Stochower v. *Board of Higher Education*, 350 U.S. 551 (1956) 11
Sturges v. *Crowninshield*, 4 Wheat. 122, 4 L.Ed. 589 (1819) 18
Sweezy v. *New Hampshire*, 354 U.S. 234 ..... 15, 16
Treigle v. *Acme Home Association*, 297 U.S. 189 (1936) 17, 18
United States v. *Robes*, 389 U.S. 258 (1967) 10, 14
Whitehill v. *Elkins*, 389 U.S. 54 (1967) 8, 11
Wieman v. *Updegraff*, 344 U.S. 183 (1952) 15, 16
Winters v. *New York*, 333 U.S. 509 (1948) 10
Wood v. *Lovett*, 313 U.S. 362 17
Yates v. *United States*, 354 U.S. 298 (1960) 14

UNITED STATES CONSTITUTION

First Amendment 3, 12, 13, 14, 15, 16
Fourteenth Amendment 9, 18

STATUTES—UNITED STATES

28 U.S.C. Sec. 1343 (3) 2
28 U.S.C. Sec. 1253 2
28 U.S.C. Sec. 2201 2
42 U.S.C. Sec. 1983 2
45 U.S.C. Sec. 2281 2

STATUTES—STATE

1963 C.R.S. 123-17-6 through 8 ..... 2-3, 3
1963 C.R.S. 123-18-1 et seq. 3, 4, 17

OTHER AUTHORITIES

Black's Law Dictionary, Third Edition 10
Ramdom House Dictionary of the English Language (1967) 10

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JURISDICTIONAL STATEMENT

Appellants appeal from an order of a three-judge District Court for the District of Colorado dated October 16, 1969, upholding the constitutionality of an oath requirement made of the appellants under State law and denying appellants' demands that appellees be perpetually enjoined from requiring said oath.

MEMORANDUM OPINION AND ORDER BELOW

The opinion of the Court is reported at 304 Fed. Sup. 1152. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C. Sections 1343(3) and 2201, 42 U.S.C. Section 1983, and 45 U.S.C. Section 2281, to declare unconstitutional and enjoin the enforcement of a statute of the State of Colorado requiring the execution of a loyalty oath of teachers. The order of the District Court denying the plaintiffs' demands for relief was dated October 16, 1969, and notice of appeal was filed in the District Court for the District of Colorado on November 14, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn*, 272 U.S. 295, 305 (1926); *Florida Lime and Avocado Growers Inc.* v. *Jacobsen*, 362 U.S. 73, 85 (1960); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

STATE LAW INVOLVED

Each of the plaintiffs has been ordered by the supervising authority at his particular school to take the following oath or affirmation:

> "I solemnly (swear) (affirm) that I will uphold the constitution of the United States and the constitution of the State of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter."

The school officials seek to impose the oath requirement pursuant to 123-17-6, 123-17-7 and 123-17-8, 1963

C.R.S. as amended, a law which took effect July 1, 1969. The statute in its entirety is attached hereto as Appendix B. In summary, it requires that all persons employed to teach in the public schools and state colleges and universities must take the oath before embarking on or continuing their teaching duties. The penalty section of the statute (123-17-8) does not apply directly to persons refusing to take the oath but rather provides that any person in charge of a school, college, or university who permits a teacher to enter upon the discharge of his duties without taking the oath shall be guilty of a misdemeanor.

Tenure rights of public school teachers (not college and university level teachers) are governed by 1963 C.R.S. 123-18-1 et. seq. which is set out in full by Stipulation. [R 97-101]

QUESTIONS PRESENTED

Where the state law requires as a condition of employment by state schools the execution of an oath to uphold the Constitution of the State of Colorado and of the United States of America and to faithfully perform the duties of the position entered upon, does said requirement

1. Offend substantive and procedural rights to due process;

2. Inhibit and restrain the freedom of speech protected by the First Amendment of those required to execute the oath;

3. Deny to those required to take the oath the equal protection of the laws;

4. Impair the obligation of existing contracts made between the various state schools and their teacher employees.

STATEMENT OF THE CASE

Appellant Ohlson is a teacher of tenured status at Metropolitan State College, Denver, Colorado. Appellant Nathan occupies a similar position at Colorado State University, Fort Collins, Colorado. Appellants Spillman and Groff are teachers employed by School District 1, Denver, Colorado. The former has tenured status; the latter does not. The other twenty appellants are teaching members of the faculties at the University of Colorado, Boulder, Colorado and Colorado State College, Greeley, Colorado. All except Franklin, Pitler and Groff occupy tenured positions.

The Appellee presidents of the University of Colorado, Colorado State University, Colorado State College, Metropolitan State College and other Appellee presidents of state colleges have uniformly interpreted the statute as requiring immediate termination of employment of those teachers who fail to comply with the mandate of the law without notice, hearing or appeal. (See Appellants' Exhibits 2, 3, 4, 5, 6 and 7 attached to the Complaint [R 10-16] and Par. 10 of Stipulation [R 62-63].) The Denver Public Schools have taken the position that failure to take the oath will bar the teacher from teaching and from being paid. (See Appellants' Exhibit 8 attached to the Motion to Intervene of appellants Spillman and Groff [R 30] and Stipulation Par. 14 [R 92].)

As to the Denver public school teachers, tenure rights are governed by 123-18-1 et seq., 1963 C.R.S. as amended. All other aspects of the employment contract are embodied in a document entitled "agreement between the School District Number One in the City and County of Denver, State of Colorado and the Denver Classroom Teachers Association." [Stipulation R 107-111]

Employment at the University of Colorado, Metropolitan State College and Colorado State University is governed by contract between the individual teacher-employee and the employer-institution. These contracts ordinarily consist of the writings of the parties and certain established policies, rules and procedures of the school, including rules relating to tenure.

University of Colorado tenure rights are spelled out in the current Faculty Handbook pp. 26-31. Provision is made for three kinds of appointment: (1) limited, (2) indeterminate, (3) continuous (permanent). After a specified probationary period not exceeding seven years a faculty member is entitled to continuous tenure status. This status can be terminated only by retirement because of age, resignation of the faculty member, "extraordinary financial exigencies" or adequate cause, "when in the judgment of the Regents, the good of the university requires such action." There is no provision for summary dismissal. A procedure for notice and hearing is provided for. [Stipulation R 65-78]

Similar rules prevail at Metropolitan State College, Colorado State College, Colorado State University and other Appellee colleges since these schools generally follow the tenure standards of the American Association of University Professors (AAUP). They are found in Personnel Regulations and Policies—State Colleges in Colorado, and the Faculty Staff Manual of Colorado State University. [Stipulation R 81-89]

A Colorado public school teacher achieves continuous tenure status after serving three continuous years on a full-time basis. Thereafter his employment contract can be cancelled only for incompetency, neglect of duty, immorality, insubordination, justifiable decrease in the number of teaching positions or "other good and just cause". 123-18-7, 1963 C.R.S. Like his college counterparts, he has the right to notice, hearing, and appeal. [R 97-101]

THE QUESTIONS ARE SUBSTANTIAL

The oath and statute in the present case is substantially similar to the loyalty oaths required of teachers, either as teachers, or as persons paid from public funds by more than one-half of the states of the Union. These states, as a phase of a loyalty program, require that school and university teachers subscribe to oaths of the "positive" kind by which the oath-taker agrees to "support" or "uphold" the State and Federal Constitutions. To such an oath is often added other undertakings, such as a promise not to advocate subversive doctrines, or an affirmation that the oath-taker will teach respect for the flag and institutions of the United States, or an undertaking similar to the undertaking of the present Colorado oath, that the oath-taker will discharge the duties of his position. The oath and statute raises, therefore, questions of substantial widespread public importance; the questions presented by the present appeal relate to the scope of the power of the states to require of teachers in schools, colleges and universities loyalty oaths of the "positive" variety as a precondition of continuation in their profession.[1]

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1. The following is a list of statutes which purport to require of teachers affirmations of the "positive" variety: Alabama, Const. §279, Ala. Code Tit. 41, §§21-28; Alaska, Const. §5, Art. XII, Alaska Stat. 1962, §39.05.130; Ariz. Rev. Stat. §§15-231, 15-232, 38-231; Calif. West's Ann. Code, *Education*, §231.18; *Government* §§1360, 1369, 18150-18158; Fla. Stat. Ann. §231.18; Ga. Code §§89-311 to 89-316, 32-1022 to 32-1024; Hawaii Rev. Stat. ch. 5, §120-138; Idaho Code §59-401; Ill. S.H.A. ch. 127 §§166a, 166b; Ind. Burn's Stat. Ann. §§28-5112 to 5115; Ia. Code Ann. §63.10; La. Rev. Stat. §42:52; Mass. Gen. Laws, ch. 71, §30A; Mich. Comp. Laws Ann. §§388-401, 402; Mont. Rev. Codes 1947, §§75-4705 to 75-4707; Neb. Rev. Stat. §11-101.01; Nev. Const. Art. 11, §5, Art. 15, §2; N.H. Rev. Stat. Ann. ch. 191:1-5; N.J. Stat. Ann. ch. 18A: 6-7, 26-29, ch. 41: 1-3; N.Y. Education Law, Tit. 16, 3002; N.D.Cent. Code §§15-37-01 to 04; Ore. Rev. Stat. §§342.615, 620, 625; Purdon's Pa. Stat. Ann. Tit. 65, §§214, 215; S.D.Comp. Laws 1967, §§3-1-6, 3-1-7, 13-42-11; Tenn. Code Ann. §§49-1303 & 1304; Vernon's Ann. Tex. Stat. Art. 6252-7; Vt. Stat. Ann. Tit. 16, §4; Wash. Rev. Code Ann. §28.70.150 & 151; W. Va. Code §1807.

1. The oath statute offends substantive and procedural due process.

The appellants do not agree with the finding of the District Court below that the statutory oath they attack in this case has a definite, clear meaning and that the oath-taker knows in advance the nature of that undertaking. The District Court found that the word "uphold" has substantially the same meaning as the word "support" and found, therefore, that its decision in *Hosack* v. *Smiley*, 276 F. Supp. 876 (D. Colo. 1967), *aff'd*, 390 U.S. 744, which found valid a required oath to "support" the Constitutions of the United States and Colorado, was controlling: the obligation the oath-taker assumes is to recognize "that ours is a government of laws and not of men." (Opinion, Appendix A, p. A5) The Appellants contend in this Court, as in the Court below, that the oath in this case is overly broad and vague because the oath-taker cannot tell, at the time of taking the oath, what act he may perform or opinion he may express consistently with the undertaking to "uphold" the United States and Colorado constitutions.

The District Court itself quoted common dictionary definitions of "uphold" and "support", which it found to be synonymous: "to . . . defend, as against opposition or criticism", "to actively promote the interests or cause of", "to uphold or defend as valid". (Opinion, Appendix A, p. A5) The District Court failed, however, to delineate the kind of conduct which would fall within or outside of the undertaking of the oath-taker. Further there is nothing in either the statute here in question or in the meaning of the words of the oath that would provide a guide with respect to the nature of the undertaking.

In these circumstances, the present statute and oath offend the principles set down in previous opinions of this

Court. *Whitehill* v. *Elkins*, 389 U.S. 54, 62 (1967), states as follows:

> "The lines between permissible and unpermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change."

In *Keyishian* v. *Board of Regents*, 385 U.S. 589, 599 (1966), the Court stated:

> "The crucial consideration here is that no teacher can know just where the line is drawn between 'seditious' and non-seditious utterances and acts."

And at p. 601:

> "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in 'those who believe the written law means what it says' . . ."

The Court likewise observed in *Baggett* v. *Bullitt*, 377 U.S. 369, 380 (1964):

> ". . . measures which purport to define disloyalty must allow public servants to know what is and what is not disloyal."

Appellants submit that the present oath and statute are invalid because they fall within the foregoing principles.

The District Court did (Opinion, p. A5, n. 4), attempt to define the undertaking of the oath: ". . . the present oath is an affirmation of belief in organic law and disbelief in the use of force to overthrow the government." That definition may or may not be the definition accepted by some future judge or prosecutor, or jury at a trial for perjury. It follows that the oath in this case suffers the

same defect as the oath in *Baggett* v. *Bullitt*, *supra*, 377 U.S. at 378:

> ". . . it is difficult to see how an abstract construction of the challenged terms such as precept, example, allegiance, institutions and the like in a declaratory judgment action could eliminate the vagueness from these terms.'

If "upholding the constitution" means "belief in organic law" and "disbelief in forceful overthrow of the government" what, in turn, do those terms mean? Appellants submit that the gloss by the District Court does nothing to eliminate the vice of vagueness as to the nature of the undertaking required of the oath-taker.

The so-called distinction between positive and negative oaths is illusory and cannot be relied upon as an unerring test to determine constitutionality. This becomes clear when the Colorado oath is viewed within context of the due process clause of the Fourteenth Amendment.

The statute prescribing the oath leaves too much to the imagination of the prospective oath giver. *Connally* v. *General Construction Company*, 269 U.S. 385. It is vague as to: members of the class regulated, procedures for removal for non-compliance, method of enforcement, who shall enforce it, the penalties, and the sanctions the schools may apply to offending members of the class.

Phrasing an oath in positive terms does not solve the constitutional problem where, as here, the oath-giver cannot ascertain the meaning of that which he is affirmatively promising to do. *Baggett* v. *Bullitt*, 377 U.S. 369 (1964). A promise to "uphold" federal and state constitutions and to "faithfully perform" the duties of their positions are the essential pledges the state seeks to extract from employees of its schools and colleges.

The absence of a definition of the verb to uphold from *Black's Law Dictionary* indicates that the word lacks a precise legal definition which can be relied upon. On the other hand, *The Random House Dictionary of the English Language* (unabridged ed., 1967) contains a number of definitions including, "to lift upward; raise", "to keep up or keep from sinking; support", and "to support or defend, *as against opposition or criticism*". (Emphasis added) Faithful job performance is likewise a concept which defies precise definition. It is not clear that the oath permits abstract criticism of the Constitution, since the oath under one interpretation of the verb, "uphold" imposes an obligation to defend it, and yet a teacher may believe that "faithful performance" of his duties requires him to criticize the Constitution.

Absence of a clearly definable standard which can be relied upon by those within the regulated class makes this oath violative of due process. *Cramp v. Board of Public Instruction of Orange County*, 369 U.S. 278 (1961); *Winters v. New York*, 333 U.S. 509 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Construction Co.*, *supra*; *Podlosky v. Massachusetts Institute of Technology*, 224 N.E.2d 414.

The absence of an ascertainable standard necessarily subjects the oath to the additional objection that it is overly broad. For example, this Court has made clear that advocacy of the use of force to overthrow our constitutions and laws may not be constitutionally punished where the state makes no distinction between actual incitement of a group of persons in circumstances which are likely to result in violence and the mere abstract teaching of the necessity of such force. *Brandenberg v. Ohio*, __ U.S. __, 89 S.Ct. 1827 (1969); *Noto v. United States*, 367 U.S. 290, 81 S.Ct. 1517; *United States v. Robel*, 389 U.S. 258 (1967). The

Colorado oath as interpreted below [App. A, p. A3] proscribes the latter activity as well as the former and is therefore too broad, extending into a constitutionally protected area. *Baggett* v. *Bullitt*, *supra*; *Elfbrandt* v. *Russell*, 384 U.S. 11 (1968); *Keyishian* v. *Board of Regents*, *supra*; *Whitehill* v. *Elkins*, *supra*.

The fact that the oath statute contemplates positive action on the part of the teacher does not justify the state's complete failure to observe the amenities of procedural due process. The statute encourages school officials to ignore accepted standards of fairness and to summarily dismiss those who fail to sign the oath without even an informal inquiry into the circumstances surrounding such failure by imposing a criminal penalty on individuals "in charge" who permit the non-oath giving teachers to continue in their positions. The statute by implication presumes a finding that the teacher to be discharged has not taken the oath, but there is no procedure for making the finding or for challenging its validity.

Deprivation of one's means of earning a living is akin to criminal punishment, *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 306 (1867). Where the penalty is dismissal from employment, the state has an obligation to give the dismissed employee a fair opportunity to be heard after receiving appropriate notice of the reason for dismissal. *Stochower* v. *Board of Higher Education*, 350 U.S. 551 (1956); *Nostrand* v. *Little*, 362 U.S. 474 (1960) (by implication); *Elfbrandt* v. *Russell*, *supra*; *Speiser* v. *Randall*, 357 U.S. 513.

The Colorado Statute does not make any provision for notice, hearing, or appeal. It appears to leave the mechanics of dismissal to the absolute discretion of the school administrators. The respondents here have universally interpreted the Statute to require summary termination of

teaching employment. [Stipulation R 62-63 and R 92] This is inconsistent with the dictates of the Fourteenth Amendment.

2. The requirement in question unconstitutionally limits and restrains speech protected by the First Amendment of the teachers in the public schools and colleges of Colorado.

The present law is a re-enactment of part of a teacher's oath on statute books of Colorado since 1921, a period characterized by the anti-communist hysteria following World War I and the passage of red flag criminal anarchy and loyalty oath legislation. Enforcement of the oath was uniformly disregarded in the 1930's and 1940's, and revival of its use came only with the rise of McCarthyism after World War II and anti-communist feelings generated by the cold war. Now, as in 1920-21, the mounting public feeling has again brought on the demand by some patriots to press for public showing of loyalty from teachers. When the 1920 oath was struck down in *Gallagher* v. *Smiley*, 270 F. Supp. 86, legislators felt constrained to preserve some kind of loyalty oath for teachers. Teachers are the ones who guide and train our youth and are laboring in an area in which such devices as loyalty oaths as means of securing conformity are most likely to be applied. Teachers and students must always be free from such arbitrary political coercion to conform and must remain free to inquire, to study and to evaluate, *Keyishian* v. *Board of Regents*, *supra*. [See Stipulation R 61] The infringement upon freedom of speech remains, even though one odious portion of it has been removed as a result of the *Gallagher* decision.

It is now clear that teachers enjoy the protection of freedom of speech guaranteed by the First Amendment and the notion that public employment may be withheld

subject to any conditions which the state may choose to impose has been thoroughly discredited. *Elfbrandt* v. *Russell*, 384 U.S. 11; *Baggett* v. *Bullitt*, 377 U.S. 360. The requirement in the oath that the signer must support both federal and state constitutions and laws has the effect of restraining significant areas of free speech. The teacher or university employee is constantly faced with the vague problem of what expression or action on his part might be interpreted as failure to "uphold" the constitutions and laws in question. It makes no distinction between expression which could be considered lawful and that deemed unlawful. Until there is established within the requirement of the oath a distinction between lawful and unlawful, the requirement as it now stands must be deemed an infringement of free speech. *Dennis* v. *United States*, 341 U.S. 494. Nowhere is the full scope of constitutionally protected freedom of speech more appropriate and nowhere more essential than in our colleges and universities. In *Barenblatt* v. *United States*, 360 U.S. 109, 112, this Court stated:

> "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the nation, are claimed, this Court will always be on the alert against intrusion by Congress into the constitutionally protected domain."

Even if the oath and statute here in question are not unconstitutionally vague, they are overly broad and intrude upon the Appellants' rights to freedom of speech and association protected by the First and Fourteenth Amendments. If "upholding a constitution" means "disbelieving in the use of force" or "believing in organic law" or recognition of the proposition that ours is a "gov-

ernment of laws, not of men", the oath and statute in the present case clearly are beyond the power of the state to enact.

This Court held, in *Brandenberg* v. *Ohio*, ... U.S. ....., 89 S.Ct. 1827 (1969), that:

> ". . . the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

In the present case, even if the oath is not unconstitutionally vague, at the very least it requires that the oath-taker forswear belief, and ipso facto expression of a belief in ". . . the moral propriety or even the moral necessity for a resort to force and violence" to overthrow the government; expressions of the opinions are protected by the well-established holdings of this Court, see *Yates* v. *United States*, 354 U.S. 298, 290, 297-298 (1960). It is axiomatic that a person cannot be required by the state to swear to refrain from lawful activity: *Louisiana ex rel. Gremillion* v. *Lightfoot*, 366 U.S. 293, 295 (1961); the oath in this case does just that.

The oath in the present case violates the guarantees of the First Amendment for the additional reason that, as construed by the court below, it fails to distinguish between belief in and advocacy of the overthrow of the government as an abstract moral doctrine and such belief and advocacy calculated to produce imminent lawless action, *Brandenberg* v. *Ohio, supra; Noto* v. *United States, supra*. The vice of the present statute and oath is the same as that in *United States* v. *Robes, supra*, at 265-266, where this Court held: "The statute casts its net across a broad range of associational activities indiscriminately

trapping membership which can be constitutionally punished and membership which cannot be so proscribed." The statute and oath in the present case, because they are aimed at the restraint of lawful conduct as well as unlawful conduct, are obnoxious to the appellants' First Amendment rights and accordingly the oath and statute should be struck down, under the doctrines of *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940), and *Shelton* v. *Tucker*, 364 U.S. 479, 490 (1960).

Finally, the statute and oath restrict and unconstitutionally impair the First Amendment rights of the appellants because, even given the attempted definition by the court below, the effect of the statute and oath upon one who believes that the obligation imposed by the oath is to be fulfilled is to make him restrict his activities, avoid associations, and curtail the expression of his opinions. The oath-taker cannot know, as even this court has stated it could not know, *Baggett* v. *Bullitt*, 377 U.S. at 373, *Elfbrandt* v. *Russell*, *supra*, 384 U.S. at 16-18, whether some future prosecutor or some future jury will share the view of the court below that the oath-taker's undertaking is definite and restricted. The true and freely expressed ideas and opinions of the appellants may subject them to prosecution and conviction, and the realization of this risk will have the effect of making them cautious, discreet, and timid in conduct and speech. Such a result would nullify the dicta of this Court that teachers must be free in thought, action, and spirit: see *Wieman* v. *Updegraff*, 344 U.S. 183, 195 (1952), and *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

3. The statute denies equal protection of the laws to state employees who are members of the teaching profession and who constitute the entire regulated class.

It is not contended that mere selection of one definable group of public employees is a denial of equal pro-

tection per se. The test is whether the classification is reasonable and whether it is calculated to achieve a legitimate public purpose. *McLaughlin* v. *Florida*, 379 U.S. 188 (1964).

Since communication is the basic tool of the teacher, and since the State has singled out its teachers as the sole group of whom the oath is required, it cannot be denied that the State's purpose is to regulate free expression in the classroom.

The State has no legitimate interest in regulating the First Amendment rights of teachers. To the contrary, the public interest in a free society demands that the free exchange of ideas between student and teacher be encouraged and that the range of classroom discussion be unfettered except where the State can show a compelling public need to the contrary. *Sweezy* v. *New Hampshire, supra; Wieman* v. *Updegraff, supra; Shelton* v. *Tucker, supra.*

The Court must consider the particular facts of the case, assessing the interests the State claims to be protecting and the interests of the persons disadvantaged by the classifications. *Kramer* v. *Union Free School District No. 15*, ...U.S....., 89 S.Ct. 1886 (1969). The State of Colorado has shown no compelling need to impose an oath such as this, and the interests of the academic community and the general public are best served by an absence of regulation. Therefore, the classification is arbitrary, without rational basis in law or fact, and constitutes an equal protection deprivation. *Douglas* v. *California*, 372 U.S. 353.

4. Imposition of the oath unconstitutionally impairs the obligations of teacher employment contracts.

Four classes of plaintiffs are substantially affected by the Colorado statute: public school teachers with tenure;

public school teachers without tenure; state college and university instructors with tenure; state college and university instructors without tenure. As to the public school teachers the rights and duties of the parties are delineated in the Colorado Teachers Tenure Act, 1963 C.R.S. 123-18-1 et. seq., and the Act is part of every employment contract. *Maxey* v. *Jefferson County School District R-1*, 158 Colo. 583, 408 P.2d 970 (1965); *Dugan* v. *School District No. 1, Arapahoe County*, 128 Colo. 594, 205 P.2d 998 (1954). Conditions of employment on the college level are embodied in various writings including letters of appointment, letters granting tenure, and school manuals. [Stipulation dated August 29, 1969, Exhibits A, B, C, D and E, R 60-89] Generally, they provide that once tenure is acquired, employment is continuous and may not be terminated without appropriate notice, opportunity for hearing, and appeal in case of termination.

The oath statute impresses all teacher contracts with new terms not anticipated by the contracting parties at the time of agreement. In addition, tenured teachers find valuable tenure rights arbitrarily terminated.

The rights of the parties to a contract are fixed at the time of its making, and the State may not divest individuals who have contracted with it of accrued rights. *Fletcher* v. *Peck*, 6 Cranch. 87, 2 L.Ed. 328 (1810); *Wood* v. *Lovett*, 313 U.S. 362. Although such contracts are admittedly subject to the reasonable exercise of the State's police power, *Stevenson* v. *Binford*, 287 U.S. 251 (1952), *City of El Paso* v. *Simmons*, 379 U.S. 497 (1965), the Court must look beyond the mere invocation of the police power to determine if the impairment is within constitutional bounds. The objective must be a public one and the means employed to achieve it cannot be arbitrary or oppressive. *Treigle* v. *Acme Home Association*, 297 U.S.

1809 (1936). One defect of the Colorado oath is that it effects a summary termination of employment without providing for the notice and hearing ordinarily required by due process and here specifically required by the contractual conditions of those teachers with tenure status. As to procedure for dismissal it modifies the pre-existing tenure contracts. Even if it be conceded that the oath has a legitimate public purpose, the means of achieving that purpose fails the test of reasonableness. *Treigle* v. *Acme Home Association, supra; Bruck* v. *State ex rel. Money,* 91 N.E.2d 349 (Ind., 1950).

This Court has been more willing to uphold impairment of a contract where that which is impaired is remedial in nature and is not a vested substantive obligation. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L.Ed. 589 (1819); *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398 (1934). The Colorado Statute goes to the heart of the teacher's contract, and in the event of failure to accape the new condition of employment (taking the oath) cuts it out entirely. It cannot be contended that only a remedy is impaired; nor can it be said that the substantive rights involved are defeasible or a minor part of the bargain so as to bring the case within the facts of *City of El Paso* v. *Simmons, supra.*

The plain truth is that the state through this statute attempts to alter ex post facto the basic obligations of its teacher contracts, or failing that, terminate them altogether without, in the case of tenured teachers, complying with its contractual duties to provide notice and hearing and to restrict termination to causes specified by the contract. This it can not constitutionally do. *State ex rel. Tittle* v. *Covington Community Consolidated School District,* 96 N.E.2d 334 (Ind., 1951); *Anderson* v. *Board of Education,* 61 N.E.2d 562 (Ill., 1945).

CONCLUSION

The promulgation of "positive" loyalty oaths for teachers is widespread throughout the United States, and there is deep concern about the civil liberties problems posed within the teaching profession and among the general populace. The questions presented here are substantial. Jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1535

MORTON K. OHLSON, MEYER NATHAN, NED BOWLER, RAY CUZZORK, ALLAN FRANKLIN, ULRICH GOLDSMITH, LESTER GOLDSTEIN, JOHN H. HODGES, FRITZ L. HOFFMANN, JOHN M. MAJOR, FRANZ MOHLING, BERTRAM MORRIS, PAUL PARMELEE, ROBERT PITLER, EDWARD ROSE, WILLIAM A. WEBER, MICHAEL WERTHEIMER, CRAIG G. SPILLMAN, REGIS GROFF, DR. RICHARD CRAWFORD, DR. RAY KNAPP, DR. JOHN BOOKMAN, DR. STEVEN POWERS, GEORGE BROOKS, and on behalf of others similarly situated,

Plaintiffs,

vs.

KENNETH PHILLIPS, President, Metropolitan State College; A. RAY CHAMBERLAIN, President of Colorado State University; FREDERICK P. THIEME, President, University of Colorado; DUKE W. DUNBAR, Attorney General of the State of Colorado; BRYON W. HANSFORD, Commissioner of Education for the State of Colorado; ROBERT D. GILBERTS, Superintendent of Schools, School District No. 1, Denver, Colorado; DR. JOHN A. MARVEL, President, Adams State College; DR. DARRELL HOLMES, President, Colorado State College; DR. HARLAN BRYANT, President, Western State College; DR. J. VICTOR HOPPER, President, Southern Colorado State College,

Defendants.

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Before BREITENSTEIN, Circuit Judge, and THEIS and DOYLE, District Judges.

MEMORANDUM OPINION AND ORDER

(Filed October 16, 1969)

DOYLE, Judge

Plaintiffs herein are teachers in the state universities and colleges in Colorado[1] and in the Denver public schools. They seek an injunction restraining the implementation of a loyalty oath required to be taken by every person employed to teach in state public schools or institutions of higher education.

Jurisdiction is based upon 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. Plaintiffs, in addition to seeking injunctive relief, also pray for declaratory judgment pursuant to 28 U.S.C. § 2201. The case has been heard by a three-judge District Court convened pursuant to 28 U.S.C. § 2281 and now stands submitted.

The oath, which is prescribed by state statute, reads as follows:

> I solemnly (swear) (affirm) that I will uphold the constitution of the United States and the constitution of the State of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter.[2]

No person may enter into or continue teaching duties in a state school unless he takes the above oath or affirmation.

The complaint alleges that the oath requirement in the statute is unconstitutional in that: (1) it is vague

1. Plaintiffs teach at Metropolitan State College in Denver, Colorado State University in Fort Collins, University of Colorado in Boulder, Colorado State College in Greeley, Western State College in Gunnison, Southern Colorado State College in Pueblo, and Adams State College in Alamosa.

2. The oath provisions appear in 63 C.R.S. §§ 123-17-6 to 17-8, *as amended*

and overbroad and in violation of the First Amendment rights of freedom of speech and association; (2) it is an arbitrary classification of teachers in violation of the Equal Protection clause of the Fourteenth Amendment; (3) it deprives plaintiffs of due process of law in that it is vague, overbroad and lacking in procedural safeguards; (4) the law is *ex post facto*, a bill of attainder and an impairment of existing contractual rights.

I

Loyalty oaths prescribed for teachers in Colorado state educational institutions have been before this Court in *Gallagher* v. *Smiley*, 270 F. Supp. 86 (D. Colo. 1967) and in *Hosack* v. *Smiley*, 278 F. Supp. 876 (D. Colo. 1967), *aff'd*, 390 U.S. 744, 88 S.Ct. 1442 (1968). In *Gallagher*, the oath was struck down as being violative of due process in that it was unduly vague, uncertain and broad. The oath at issue in *Hosack* was promulgated in an effort to comply with the *Gallagher* decision. That oath provided:

> I solemnly swear or affirm that I will support the Constitution of the State of Colorado and of the United States of America and the laws of the State of Colorado and of the United States.

This oath was held to be valid in *Hosack* as against the contentions that it violated the plaintiffs' freedom of expression and violated due process. Plaintiffs argued that it was unduly vague and did not provide hearing procedures for those who were dismissed for refusal to take the oath.

The present oath is substantially similar to that in *Hosack*. The oath in the instant case differs only in the deletion of the reference to the laws of the United States and the State of Colorado, in the addition of the affirma-

tion of fidelity to duty and in the substitution of the word "uphold" for "support".

Hosack v. *Smiley*, *supra*, is, therefore, controlling on the issue of vagueness and overbroadness as far as the oath refers to the upholding of the constitutions. Plaintiffs attempt to distinguish this oath from that in *Hosack* by pointing out that "uphold" has been defined as "to . . . defend, as against opposition or criticism".[3] Plaintiffs contend that use of the word "uphold" instead of "support" distinguishes this case from *Hosack* and results in the oath being vague.[4] There is little substance in this argument as shown by further definitions which treat "support" much like "uphold". It is defined as "to actively promote the interests or cause of . . ." and "to uphold or defend as valid".[5] Giving the words their plain meaning then, there is not such a significant difference between "support" and "uphold" so as to warrant the argued distinction between the two oaths.

Following *Hosack*, therefore, the oath in the instant case is not unduly vague, but is:

> plain, straightforward and unequivocal. A person taking it is not left in doubt as to his undertaking. The obligation assumed is one of simple recognition that ours is a government of laws and not of men. *Hosack* v. *Smiley*, *supra*, at 878.

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3. Random House Dictionary of the English Language (unabridged ed. 1967).

4. To illustrate this alleged vagueness plaintiffs ask rhetorically whether, in "upholding" a constitution, a professor is prohibited from criticizing it, whether he is bound to defend it against the criticism of his students, whether he is obligated to affirmatively advocate its virtues. Our answer is that the present oath is an affirmation of belief in organic law and disbelief in the use of force to overthrow the government.

5. Webster's Third New International Dictionary (unabridged ed. 1961).

6. *Id.*

It follows from the above that, if the oath in question is a mere recognition of our system of organic or constitutional law, it is not overbroad. It is not a sweeping and improper invasion of plaintiffs' rights of free association and expression. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338 (1963). As we said in *Hosack* on this point:

> Recognition of and respect for law in no way prevents the right to dissent and question repugnant laws. Nor does it limit the right to seek through lawful means the repeal or amendment of state or federal laws with which the oath taker is in disagreement. Support for the constitution and laws of the nation and state does not call for blind subservience. 276 F. Supp. at 879.

II

Plaintiffs' next claim that the provision in the oath providing that they will "faithfully perform the duties" of their positions is equally vague, overbroad and constitutionally infirm. We cannot agree. In *Knight* v. *Board of Regents of the University of the State of New York*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd*, 390 U.S. 36, 88 S.Ct. 816 (1968), a similar oath provision was upheld.[7] We agree with the court in *Knight* that a state can reasonably ask teachers in state schools to subscribe to professional competence and dedication. This portion of the oath merely reflects the significant interest of the state in assuring the careful selection of teachers, and imposes no restrictions on a teacher's political expressions. It is certain that there is no right to be unfaithful in the performance of duties, and hence this undertaking is implicit.

7 The relevant portion of that oath reads: "I will faithfully discharge, according to the best of my ability, the duties of the position of . . . to which I am now assigned."

III

Plaintiffs' argument that the statute violates due process in that it does not provide for a hearing upon dismissal for refusal to take the oath was also ruled on in *Hosack*. We said in that case that due process does not demand a hearing in connection with every dismissal from public employment. A teacher who is dismissed for refusal to take the oath has no need to be faced with his accuser or given an opportunity for cross-examination, since "No amount of hearing can change the fact that the person refused to take [the oath]". 276 F. Supp. at 881. His reasons for refusal are not relevant: "[W]here the oath is as we have said simple, direct and unambiguous, the hearing as to why the accused refused to take it would be virtually meaningless". 276 F. Supp. at 881.

IV

Plaintiffs further claim that the oath deprives them of equal protection of the laws by arbitrarily classifying teachers as the sole group of public employees required to take the oath. This, of course, is not accurate. The oath is an almost universal requirement of all public officials, including lawyers and judges, and it cannot be truthfully said that teachers are being picked on. Teachers would, however, be the first to admit that they work in a sensitive area in which they can shape the attitudes of the students with whom they come in contact. The state has a vital concern in the educational process, and has the right not only to screen teachers as to their fitness, *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 72 S.Ct. 380, (1952), but also to be concerned about possible advocacy of overthrow of the government by force and violence.

Plaintiffs argue, however, that the oath should be applied to *all* state employees. There is no constitutional requirement that a regulation must reach every class to which it might be applied. *Hughes* v. *Superior Court of California*, 339 U.S. 460, 70 S.Ct. 718 (1950). As long as the oath is reasonable as applied to teachers, there is no requirement that it be applied to all other groups to which its application would be equally reasonable.

V

Nor, as plaintiffs contend, does the oath in question impair the obligation of their employment contracts in contravention of Art. I, Sec. 10 of the Constitution. They argue that the statute imposes upon them an additional burden not contemplated at the time of entering into the contracts,[8] and that tenure rights are taken from the tenured plaintiffs.

The prohibition against the obligation of contracts is not absolute.[9] All contracts implicitly include the reservation by the state of its sovereign power to protect the vital interests of its people—the public health, welfare and morals.[10] As long as this reserved power is exercised for a public end, by means which are reasonably adapted to the accomplishment of that end, the power may not be restricted by individual contractual obligations. *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 56 S.Ct. 408 (1936). There can be no doubt that the state's

8. This statement is factually true as to all plaintiffs except those at the University of Colorado, where there has been an oath requirement since 1921.

9. City of El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577 (1965); Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 56 S.Ct. 408 (1936); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231 (1934).

10. City of El Paso v. Simmons, *supra*; Home Building & Loan Ass'n. v. Blaisdell, *supra*.

interest in the loyalty and qualifications of its teachers is a legitimate end. *Adler* v. *Board of Education of the City of New York, supra.* The means of achieving that end are reasonable, especially in light of our decision that the oath is not constitutionally objectionable. Any contractual impairment which might exist is not an unconstitutional impairment since it is insubstantial when balanced against the legitimate state interest being pursued. *See City of El Paso* v. *Simmons*, 379 U.S. 497, 85 S.Ct. 577 (1965).

VI

Plaintiffs' final contention is that the oath statute constitutes both a bill of attainder and an *ex post facto* law. Punishment is a prerequisite of these forbidden legislative acts. The statute in the instant case imposes no punishment, as it is merely a general regulation providing standards of qualification and eligibility for a position. The imposition of such qualifications by the legislature does not amount to a "punishment". *Garner* v. *Board of Public Works*, 341 U.S. 716, 722, 71 S.Ct. 909, 913-14 (1951); *Ex Parte Garland*, 4 Wall. 333, 379-80, 18 L.Ed. 366, 370 (1867). Thus, the statute in question is neither *ex post facto* nor a bill of attainder.

We are unable to fully discern why the plaintiffs find the taking of any oath so obnoxious. We are led to believe that they entertain uncertainty as to what they are promising or perhaps reservations as to its significance. These reasons do not, however, furnish a basis for holding the statute invalid. The decision as to its worth or value is for the legislature, and we are not prepared to say that it does not serve a purpose any more than we could say that the Constitution itself is valueless. The oath is rooted as deeply in our system as is the Constitution. The latter, of course, not only represents a system of government, it is as well a symbol or

hallmark of our democracy. As such it serves to give us some measure of cohesiveness, and in that respect serves a substantial purpose. This explanation is found in the concluding paragraph of Chief Justice Vinson's opinion in *American Communications Ass'n, C.I.O., et al.* v. *Douds*, 339 U.S. 382, 415 (1950):

> Clearly the Constitution permits the requirement of oaths by officeholders to uphold the Constitution itself. The obvious implication is that those unwilling to take such an oath are to be barred from public office. For the President, a specific oath was set forth in the Constitution itself. Art. II, § 1. And Congress has detailed an oath for other federal officers. Obviously the Framers of the Constitution thought that the exaction of an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved.

* * *

Having concluded that the statute is valid and that the plaintiffs' case is without merit, it is

ORDERED that the Clerk prepare a formal judgment in favor of defendants and against plaintiffs dismissing the complaint and the cause of action.

DATED at Denver, Colorado, this 16th day of October, A.D. 1969.

BY THE COURT:

/s/ Jean S. Breitenstein
Jean S. Breitenstein, Judge
United States Court of Appeals

/s/ Frank G. Theis
Frank G. Theis, Judge
United States District Court

/s/ William E. Doyle
William E. Doyle, Judge
United States District Court

APPENDIX B

TEACHERS OATH STATUTE

Colorado Revised Statutes 1963, as amended in 1969:

123-17-6. Teacher's oath or affirmation.—(1) Any person now holding a certificate to teach in the public schools in the state of Colorado or who shall hereafter be issued a certificate to teach in such public schools within the state of Colorado, except any person employed to teach in a temporary capacity who is a citizen of a nation other than the United States, shall take the following oath or affirmation:

"I solemnly (swear) (affirm) that I will uphold the constitution of the United States and the constitution of the state of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter."

(2) The said oath or affirmation shall be administered by any person authorized to administer oaths in the state of Colorado.

123-17-7. Professors, instructors, and teachers in state institutions of higher education to take oath or affirmation.—(1) Every person employed to teach in any state university, college, junior college, community college, or technical college in the state of Colorado, before entering upon or continuing the discharge of his or her duties shall take the following oath or affirmation, except that any person employed to teach in a temporary capacity who is a citizen of a nation other than the United States shall not be required to take such oath or affirmation:

"I solemnly (swear) (affirm) that I will uphold the constitution of the United States and the constitution of the state of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter."

(2) The said oath or affirmation shall be administered by any person authorized to administer oaths in the State of Colorado.

123-17-8. Penalty.—Any person who, being in charge of any public school, state university, college, junior college, community college, or technical college within the state of Colorado, who shall allow or permit any teacher to enter upon the discharge of his duties or give instruction therein, unless such teacher shall have taken the oath or affirmation provided for in sections 123-17-6 and 123-17-7, as amended; shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment.

(Effective date. July 1, 1969.)

SUPREME COURT, U. S.

MAR 9 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1182

MORTON K. OHLSON, et al.,
Appellants,

vs.

KENNETH PHILLIPS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM OR DISMISS

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INDEX

Argument

1. The issue of substantive due process and freedom of speech raised in questions 1 and 2 respectively are not so substantial as to require further argument 2

2. The issue of procedural due process raised in question 1 is not so substantial as to require further argument 2

3. The factual basis of question 3 is inadequate to support further argument 2

4. The factual basis of question 4 is inadequate to support further argument 3

Conclusion 5

Certificate of Service 6

Table of Cases

Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380 (1952) 2, 3

Cafeteria and Rest. Workers Local 473 v. McElroy, 367 U.S. 886, 81 L.Ed.2d 1230, 81 S.Ct. 1743 (1961) 4

Gallagher v. Smith, 270 F.Supp. 30 (D.C. Colo. 1967) 4

Hyland v. University of Missouri, 80 (13 Wall.) U.S. 526, 22 L.Ed. 160 (1873) 4

Howard v. Smith, 276 F.Supp. 876 (1967), Aff'd (per curiam) 390 U.S. 744, 88 S.Ct. 1432 (1968) 2, 3

Knight v. Board of Regents, 269 F.Supp. 339 (1967), Aff'd (per curiam) 390 U.S. 36, 19 L.Ed.2d 812, (1968) 2, 3

IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM OR DISMISS

Appellees in the above-entitled action move to dismiss or affirm on the grounds that the appeal does not present questions so substantial as to require further argument.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1182

MORTON K. OHLSON, et al.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1182

MORTON K. OHLSON, et al.,
Appellants,

vs.

KENNETH PHILLIPS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

PETITION FOR REHEARING

The appellants respectfully move this Court for an order (1) vacating its opinion and order entered March 23, 1970, granting the motion to affirm and affirming the judgment below, and (2) noting probable jurisdiction. As Grounds for this motion, appellants state the following:

On January 23, 1970, *Connell* v. *Higginbotham*, No. 1113, October Term, 1969, was docketed in this Court by the filing of the Jurisdictional Statement, and on March 5, 1970, *Adams* v. *Florida Bd. of Regents*, No. 1281, October Term, 1969, was similarly docketed. Both of those cases are appeals now pending before this Court in which issues, similar to the issues in the present case, are presented for review.

While the instant appeal involves the constitutionality of the teachers' oath requirement prescribed by the Colorado statute, 1963 Colo. Rev. Stats. 123-17-6, 123-17-7, and 123-17-8, as amended, much the same considerations will be before this Court should it consider the attack by the appellants in *Connell* and *Adams* upon the constitutionality of the Florida loyalty oath statute, Fla. Stats. Ann. §§ 876.05-876.10.

The oath provided for by the Florida statute has clauses of both the "negative" or disclaimer type and the "positive" variety. In the "positive" clause of the Florida oath the oath-taker is required to swear that he ". . . will support the Constitution of the United States and of the State of Florida". The Middle District of Florida District Court held unconstitutional the clauses of the oath in which the oath-taker was required to disclaim membership in parties and organizations but found severable and constitutional the "positive" portion of the oath. The constitutional attack by the *Connell* and *Adams* appellants upon the "positive" clause of the Florida oath will involve consideration by the Court of several of the points raised by the appellants in the present case in their Jurisdictional Statement because the Colorado oath in issue is substantially similar to the "positive" portion of the Florida oath.

In the event that this Court should agree with the contention of the *Connell* and *Adams* appellants that the

"positive" clause of the Florida oath violates the First and Fourteenth Amendments' protection of freedom of expression, belief, and privacy, and that that clause also violates the Fourteenth Amendment because of its vagueness and its failure to provide for ascertaining the meaning of the language of the clause and the failure to provide for hearing or procedural safeguards (see *Connell* v. *Higginbotham, supra, Jurisdictional Statement*, pp. 16-18, 20), to leave the substantially similar Colorado oath standing and effective would be anomalous and would impose a burden on the appellants and their fellow teachers in Colorado not shared by persons similarly situated in other states. Such a result should be avoided.

The identity of the issues and similarity of the oath in the present case with the "positive" clause of the Florida oath and the issues relating to that clause presented by the *Connell* and *Adams* cases is a substantial reason for reconsideration of the *per curiam* opinion in the present case affirming the judgment of the District Court below. Because the issues involved are of substantial importance to the public as well as to the teachers of Colorado, the opinion affirming the judgment below should be reconsidered and a rehearing granted so that this case can be heard and decided with the *Connell* and *Adams* cases.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Jurisdictional Statement of the appellants, appellants pray that this Court grant rehearing of the opinion and order granting the motion to affirm, vacate that opinion and order, and exercise plenary review of this appeal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the appellants, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

WILLIAM F. REYNARD
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

October Term, 1960

ORLSON ET AL. v. PHILLIPS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 1182. Decided March 28, 1960.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.